# RECENT DECISIONS.

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ACCOUNT—STATUTE OF LIMITATIONS—MUTUAL AND ONE-SIDED ACCOUNTS.—The plaintiff was co-maker of a note, and in ignorance of its discharge paid various sums upon it, the later payments being made within the statutory period of limitation. He sued to recover all the payments. *Held,* the entire account was taken out of the statute. *Roberts* v. *Neale* (Mo. 1908) 114 S. W. 1120.

By the weight of authority, the rule that the statute of limitations begins to run from the last item of either side of a mutual, open and current account rests on the reasoning that each item is an acknowledgment of the balance due from which the law implies a promise to pay. *Bradford* v. *Sfykers Adm'r* (1858) 32 Ala. 134; *Catling* v. *Skoulding* (1795) 6 T. R. 189. The rule has been denied in some states owing to the difficulty of torturing a promise out of a mere item of account. *Blair* v. *Deen* (1833) 6 N. H. 235; *Sproyle* v. *Allen* (1873) 38 Md. 331. The more plausible view is that on entering into such an account the parties agree that the items shall not constitute independent debts, but that the account shall continue open until a balance be struck. This agreement is implied from the mutuality of the account. *Gunn* v. *Gunn* (1885) 74 Ga. 555. If the more general theory is accepted mutuality is also necessary, for, in the case of mutual accounts, it is the balance which is the only debt, *Green* v. *Disbrow* (1879) 79 N. Y. 1; *Abbott* v. *Keith* (1839) 11 Vt. 525, and hence an item may be regarded as an acknowledgment that the balance is due, while if the items be all on one side each item is a separate obligation and a fresh item is not an acknowledgment that the total is owing. *Abbott* v. *Keith, supra.* The parties may, of course, agree that such an account shall be regarded as one transaction, *Chadwick* v. *Chadwick* (1893) 115 Mo. 581, but the court, in the principal case, erred in directing the jury to find such an agreement from the mere nature of the account.

ADVERSE POSSESSION—EFFECT OF A JUDGMENT IN EJECTMENT.—The assignor of the plaintiff had sued the defendant's grantor to regain possession of land and recovered judgment. The judgment debtor then conveyed to the defendant, and the latter sets up the defense of the Statute of Limitations to the action brought by the plaintiff assignee. *Held,* the recovery of the judgment interrupted the adverse possession. *Rao* v. *Oke* (1908) 11 Bombay Law Reporter 51. See NOTES, p. 351.

BANKRUPTCY—PARTNERSHIP—MISCONDUCT OF A CO-PARTNER AS A GROUND FOR REFUSING DISCHARGE.—A firm as such and the members individually having been adjudicated bankrupt, one of the partners applied for a discharge. Section 14b of the Bankruptcy Act of 1898, by an amendment in 1903, provides: "The judge shall * * * discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person. * * *" Property was so obtained for the firm, without the knowledge or consent of the applicant, by a co-partner acting within the scope of the partnership business. *Held,* Shelby, J., dissenting, this misconduct should not be imputed to the applicant so as to bar a discharge. *Hardie* v. *Swafford Bros. Dry Goods Co.* (1908) 165 Fed. 588. See NOTES, p. 346.

BANKRUPTCY—STATE AND FEDERAL COURTS—ABANDONMENT OF FEDERAL JURISDICTION.—A Missouri corporation sued in a State court, garnisheeing funds in the hands of defendant's debtors. The defendant appeared specially, alleging the pendency of involuntary proceedings in bankruptcy against it, and a Federal court injunction restraining the present suit. The

Federal court had, five years previously, declined to appoint a receiver, allowing a committee of creditors to conduct the defendant's business. *Held*, three judges dissenting, the Federal court having abandoned jurisdiction, the State court could hear the suit. *Beckman Lumber Co.* v. *Acme Harvester Co.* (Mo. 1908) 114 S. W. 1087.

The injunction was not binding upon the plaintiff, because not served upon him within the Federal court's jurisdiction. See *In re Waukesha Water Co.* (1902) 116 Fed. 1009; *Toland* v. *Sprague* (1838) 12 Pet. 300, 328. The filing of the petition gave the Federal court jurisdiction, Bankr. Law (1898) § 1, Clause 10, and placed the debtor's property in abeyance pending an adjudication. *In re Granite City Bank* (1905) 137 Fed. 818, 820; *Mueller* v. *Nugent* (1902) 184 U. S. 1, 14. The State court should not have allowed the garnishee proceedings, since the jurisdiction of the Federal court included the right to retain control of the cause, free from interference by other courts, until the last step should be taken, or an appeal lie. The court could suspend the exercise of its jurisdiction in its discretion, without thereby losing control of the cause. *Sanford* v. *Sanford* (1859) 28 Conn. 5, 13, 14; *McLean* v. *Wayne Circuit Judge* (1884) 52 Mich. 258. The failure to appoint a receiver did not work an abandonment of jurisdiction, since it is within the discretion of the court whether to make such appointment as a method of controlling the debtor's estate. Bankr. Law (1898) § 2, Clause 3. Accordingly, the dissenting opinion seems preferable.

CONFLICT OF LAWS—CONTRACTS—REMEDY AND OBLIGATION.—Suit was brought in New York to recover for goods destroyed by fire while in transit from Chicago to New York under a bill of lading purporting to exempt the defendant carrier from such risk. By an Illinois statute a bill of lading must be expressly assented to to give effect to such exemption, while in New York, the receipt of it is enough. There was no express assent. *Held*, it was not a matter of remedy to be governed by the *lex fori*. *Valk* v. *Erie Railroad Co.* (App. Div. 1909) 40 N. Y. L. J., No. 111.

In contracts, matters relating to the remedy are governed by the *lex fori*, while those pertaining to the obligation are not. Minor, Conflict of Laws, § 181. Authority is divided as to which class the assent to the bill of lading belongs. *Merchants' Despatch Co.* v. *Furthmann* (1893) 149 Ill. 66 (obligation); *Hoadley* v. *Northern Transportation Co.* (1874) 115 Mass. 304 (remedy). Not every matter of remedy is distinct from the obligation, and it may be so essentially a part of the obligation as to be determined by the law establishing the obligation. *The Harrisburg* (1886) 119 U. S. 199. This would seem the better view in regard to a statute of frauds declaring no action may be brought, Wharton, Conflict of Laws, 1455, and in regard to the admissibility of a contemporaneous parol agreement to explain a written contract. *Pitcairn* v. *Hiss Co.* (1903) 125 Fed. 110; but see *Donner* v. *Cheseborough* (1869) 36 Conn. 39. The argument of the *Hoadly* case that the Illinois statute, requiring express assent, merely goes to the remedy in establishing a rule of evidence and is therefore to be governed by the *lex fori* disregards the fact that the very existence of the contract depends upon the statute with the result that it pertains to the obligation rather than the remedy. *Hartmann* v. *Louisville & N. Ry. Co.* (1890) 39 Mo. App. 88. The principle of the case last cited is clearly shown in those cases declaring that a statute destroying all previously existing remedies goes to the obligation, although in form only directed toward the remedy. Note 26 L. ed. U. S. 132; Cooley, Const. Lim. 410, 411, 517, 526. The principal case, therefore, in proceeding upon the basis that the question is one of contractual obligation rather than of remedy appears sound.

CONFLICT OF LAWS—MARRIAGE—PERSONAL CAPACITY.—An Englishwoman married in England a Hindu domiciled in India. His defence to her suit for separation was that the Hindu law made him incapable of marrying her. *Held*, the alleged disqualification was no defense against the marriage

valid by English law. *Venugopal Chetti* v. *Venugopal Chetti* (1908) 99 L. T. R. 885.

The American decisions generally support the rule that the validity of a marriage is determined by the law of the place where the contract was made, subject to the universally recognized exceptions of polygamous and incestuous marriages. Wharton, Conflict of Laws, 135a, 165a; *Ponsford* v. *Johnson* (1847) 19 Fed. Cas. 11,266; *Voorhis* v. *Brintnall* (1881) 86 N. Y. 18. Sometimes the courts of the domicil refuse to be bound by this rule when the marriage is opposed to their public policy, *Pennegar* v. *State* (1889) 87 Tenn. 244; *State* v. *Kennedy* (1877) 76 N. C. 251, though the opposing *lex celebrationis* has prevailed over the *lex fori* when the parties had a *bona fide* domicile in the place of the marriage. *State* v. *Ross* (1877) 76 N. C. 242. The English decisions are in some confusion. In *Simonin* v. *Mallac* (1860) 2 L. T. R. 327, the American rule of the *lex celebrationis* was in terms adopted, but *Brook* v. *Brook* (1861) 4 L. T. R. 93, limited its application to the forms of the contract, holding that as to its essentials the *lex domicilii* should prevail. Following the *Brook* case *Mette* v. *Mette* (1859) 1 Sw. & Tr. 416 and more particularly *Sotomayor* v. *DeBarros* (1877) 37 L. T. R. 415 further committed the courts to the *lex domicilii* rule, with the provision, applicable to the principal case, that if one of the parties were English, that law should prevail. In the first case a domiciled Englishman married in Germany a domiciled German, the sister of his deceased wife. In the second, two domiciled Portuguese within the forbidden degree of consanguinity by the Portuguese law married in England. In both it was held that the incapacity under the *lex domicilii* invalidated the marriage. *Ogden* v. *Ogden* (1908) 77 L. J. P. D. & A. Div. 34, however, took care to reiterate that the *lex loci* rule of *Simonin* v. *Mallac, supra,* governs in matters of form. These variations in the application of the rule are explained by the ever controlling influence of the policy of the forum. If, in the principal case, both parties had been Hindus, a different result would have been reached.

CONTRACTS—ILLEGALITY—PAR DELICTUM—CONTRACTS IN RESTRAINT OF TRADE.—The plaintiff, an illegal monopoly under the Anti-Trust Act of 1900, to complete its monopoly, compelled the defendant and other jobbers to contract to keep up prices and to buy their entire stock from the plaintiff corporation. The plaintiff later sued for the price of goods sold and delivered under an independent contract. *Held,* for the defendant, since the contract sued on was illegal. *Continental Wall Paper Co.* v. *Voight & Sons Co.* (1909) 29 Sup. Ct. Rep. 280. See NOTES, p. 343.

CORPORATIONS—CONTRACT TO SELL VOTING RIGHTS.—In a jurisdiction providing by statute for the sale of the entire property of corporations by sixty per cent. vote in regular meeting, the defendant owning fifty per cent. of the shares of the corporation made the plaintiff an option on his property, promising upon exercise of the option to call a meeting and vote for such sale. *Held,* that the contract was in disregard of the defendant's fiduciary relation, and void as against public policy. *Bias* v. *Atkinson* (W. Va. 1909) 63 S. E. 395.

Ordinarily a non-office holding stockholder occupies no fiduciary relation to the company or to his fellow stockholders, *Bjorngard* v. *Goodhue Co. Bank* (1892) 49 Minn. 483; and the shareholder may vote for his individual interests in disregard of the interests of the corporation. *Windmuller* v. *Standard Distilling Co.* (1902) 115 Fed. 748; *Pender* v. *Lushington* (1877) 6 Ch. Div. 70. But where a line of policy, adopted by the votes of the majority of stockholders, or by vote of a majority stockholder, is called into question by the minority, the transaction will be closely scrutinized for fraud, *Chicago Hansom Cab Co.* v. *Yerkes* (1892) 141 Ill. 320. and there is a tendency toward holding that the relation of the majority, or one holding a majority of shares is fiduciary. *Crichton* v. *Webb Press Co.* (1904) 113 La. 167; *Farmers' L. & T. Co.* v. *N. Y. & N. Ry. Co.*

(1896) 150 N. Y. 410; *Wheeler* v. *Abilene Nat'l Bank Bldg. Co.* (1908) 159 Fed. 391. Although in England, the right of voting is incidental to the ownership of shares and the shareholder may deal with it as he pleases, *Greenwell* v. *Porter L. R.* (1902) 1 Ch. 530, contracts whereby the stockholder surrenders his right to vote have generally been held against the policy of our law, since each stockholder is entitled to a best judgment of his fellow stockholders. *White* v. *Thomas Inflatable Tire Co.* (1893) 52 N. J. Eq. 178. It has been held that such contracts are absolutely void where the voting party stands in a fiduciary relation; as an officer; *Noel* v. *Drake* (1882) 28 Kan. 265; *Wilbur* v. *Stoepel* (1890) 82 Mich. 344; *West* v. *Camden* (1890) 135 U. S. 507; and if the holder of a majority of stock be so far regarded as a fiduciary, his contract to sell his voting rights is subject to the same rule, *Guernsey* v. *Cook* (1876) 120 Mass. 501, and the principal case is sound.

CORPORATIONS—STATUS OF PRESIDENT—ADMISSIONS.—In an action for the price of coals delivered by the plaintiff company, the defendant sought to introduce as evidence admissions made by the president of the plaintiff company subsequent to the negotiation. *Held*, the evidence was admissible, since the president was the plaintiff's *"alter ego."* *Home Ice Factory* v. *Howell's Mining Co.* (Ala. 1908) 48 So. 117.

If by *"alter ego"* the court in the principal case meant that the act of the president was the act of the corporation in chief, the case cannot be supported, since the doctrine, questionable at best, that a corporation can act in chief, originated in the necessity of a certain class of cases and has never been extended so far. 8 COLUMBIA LAW REVIEW 403. Most cases regard the president as an agent, for, in the absence of charter provisions, both the officers and directors of a company exercise a delegated power. *Titus & Scudder* v. *Cario etc. R. R.* (1874) 37 N. J. L. 98; *Union Pac. Ry. Co.* v. *Chicago etc. Ry. Co.* (1895) 163 U. S. 564 at 595. Where specific powers are conferred on them by statute, some cases, it is true, regard their power as undelegated, *Hoyt* v. *Thompson's Executors* (1859) 19 N. Y. 208, but the better view, it is submitted, is to regard them even then as agents, deriving from the corporation their authority, the scope of which only is prescribed by the legislature. *Bank of U. S.* v. *Dandridge* (1827) 12 Wheat. 64; Morawetz, Corp. sec. 515. Two views exist in regard to the scope of the powers of the president, the one confining them to those expressly conferred by the corporation; *Crawford* v. *Albany Ice Co.* (1900) 36 Ore. 535; the other, under which the principal case might rest, widening them by implication to include the powers of a managing agent, and casting the burden on the company of showing his want of authority. *Creeder* v. *Lumber Co.* (1891) 86 Mich. 541; *Bambrick* v. *Campbell* (1889) 37 Mo. App. 460. The case, however, cannot be supported on the reasoning of the court. See *First Nat'l Bank* v. *Ocean Nat'l Bank* (1875) 60 N. Y. 278; *Nat'l Bank of Rondout* v. *Byrnes* (N. Y. 1903) 84 App. Div. 100.

CORPORATIONS—STOCKHOLDERS' STATUTORY LIABILITY—TRUST FUND THEORY.—Under a statute providing that the stockholders shall be ratably liable to the par value of their stock, a bill was filled by creditors in behalf of themselves and others against the corporation and its stockholders. *Held*, such statutory "double-liability" constitutes a "trust fund," enforcible only in equity. *Conway* v. *Owensboro Bank* (1908) 165 Fed. 822.

At common law, in the absence of a charter proviso, the stockholder is not individually liable for the debts of the corporation. 2 Mor. Corp. 779. The creditors may, however, collect a stockholder's unpaid subscriptions as part of the "trust fund," *Sawyer* v. *Hoag* (1873) 17 Wall. 810, by virtue of the shareholder's promise *to the corporation* either express, *Hatch* v. *Dana* (1879) 101 U. S. 205, or implied in law. *Hawley* v. *Upton* (1880) 102 U. S. 314, 317. The creditor's right is enforcible in equity alone, and then only when the court can find independent grounds of jurisdiction. 8

COLUMBIA LAW REVIEW, 305. But under the stockholder's statutory individual liability to the creditor, the right of the latter to sue arises out of the debtor's direct promise to him. *Aldrich* v. *Anchor Coal Co.* (1893) 24 Ore. 32; *Mokelumne Co.* v. *Woodbury* (1859) 14 Cal. 265, 267. The creditor can, therefore, sue the stockholders severally at law either in contract, *Whitman* v. *Oxford Nat'l Bank* (1900) 176 U. S. 559, 563, or preferably in quasi-contract. *Post* v. *Toledo R. R. Co.* (1887) 144 Mass. 341, 343; *Hancock Nat'l Bank* v. *Farnum* (1898) 20 R. I. 466, 470. Although the creditor's right is undoubtedly contractual in its nature, there may be a concurrent remedy in equity, when necessary to insure *pro rata* distribution, *Briggs* v. *Penniman* (1826) 8 Cow. 386, 392, and where such is the manifest intent of the statute, the remedy must be equitable. *Pollard* v. *Wall* (1874) 20 Wall. 525, 527. In the principal case the facts undoubtedly justify equitable jurisdiction on the independent ground of multiplicity of suits, but the court's reasoning seems erroneous in basing equitable jurisdiction exclusively on the so-called "trust fund" which only arises as a scheme of administering the assets. The decision also fails to recognize the creditor's quasi-contractual rights existing in spite of a concurrent equitable remedy.

ELECTIONS — DEFECTIVE VOTING MACHINES — TESTIMONY OF VOTERS. — A defective voting machine failed to tally some of the votes cast for the relator, though it apparently registered his opponent's votes correctly. The testimony of voters was offered to show that they had "voted" for the relator, and that with their votes he would have had a majority. *Held,* three judges dissenting, such testimony was admissible. *People ex rel. Deister* v. *Wintermute* (N. Y. 1909) 86 N. E. 818.

In the principal case the majority regarded the voter's manipulation of the machine levers as amounting to the casting of a vote, while the minority believed that the register should be conclusive of the number of votes. Despite the dangers inherent in such a policy, Cooley, Const. Lim. 912; *Beardstown* v. *Virginia* (1875) 76 Ill. 34; *Mayor* v. *Barker* (1896) 99 Ky. 305, it has become well settled that election results may be impeached for fraud, *People* v. *Pease* (1863) 27 N. Y. 45, though where ballots have been excluded through the error of election officials, evidence of the intention of the disfranchised voters has not been admitted to vary the result. *Webster* v. *Byrnes* (1867) 34 Cal. 273; *Boyer* v. *Teague* (1890) 106 N. C. 576; *State* v. *Hanson* (1894) 87 Wis. 177. Generally, however, the testimony of electors when competent has been used only as the basis of a recount of the ballots cast. Cf. *People* v. *Thornton* (1881) 25 Hun 456. Assuming the majority's construction, the court was forced to admit testimony of voters which could correct an improper account, only by the examination of *all* the voters who used the defective machine. This amounts to a holding a new election in court, seemingly a very serious innovation on the ballot system. It has been held that where election officials improperly indorse ballots, electors voting thereon cannot have their votes counted. *People* v. *Board of Canvassers* (1891) 129 N. Y. 395. The majority's *dictum* distinguishing this last case cited must be regarded as a stringent limitation. In view of present New York authorities, the difficulties raised in the principal case can hardly be regarded as finally settled.

EQUITY—JURISDICTION OVER ELECTIONS.—The plaintiff sought to enjoin the levy of a county educational tax, on the ground of fraud in the election by which the tax had been made operative. *Held,* equity may collaterally investigate an election if property rights are primarily involved. *Coleman* v. *Board of Education* (Ga. 1908) 63 S. E. Rep. 42.

Although courts of equity have with substantial unanimity refused to assume jurisdiction over the holding and contesting of elections, the assigned reasons for this refusal are far from uniform. In many cases, *e. g.* those involving title to an elective office, where *quo warranto* is available, *Skrine* v. *Jackson* (1884) 73 Ga. 377, the adequacy of the legal remedy

prevails. *Hamilton* v. *Carroll* (1896) 82 Md. 326; *Webber* v. *Timlin* (1887) 37 Minn. 274; *Connor* v. *Connor* (Tenn. 1874) 8 Baxt. 11; *Peck* v. *Weeddell* (1867) 17 Oh. 271. In others, the courts deny equity's protection for purely political rights, *Dickey* v. *Reed* (1875) 78 Ill. 261; *Parmenter* v. *Bourne* (1894) 8 Wash. 45; *Attorney General* v. *Board of Supervisors* (1876) 33 Mich. 289, or refuse to interfere with authorized election officials in the discharge of their legal duties. *Smith* v. *Myers* (1886) 109 Ind. 1; *Walton* v. *Develing* (1871) 61 Ill. 201; *People* v. *Board of Supervisors* (1888) 75 Cal. 179. In a third class of cases, equity's jurisdiction over the subject matter is denied as absolutely as in criminal cases. *In re Sawyer* (1881) 124 U. S. 200. These reasons, when applied to cases involving election frauds as collateral merely to property rights, produce differing results. If an election investigation is utterly beyond the cognizance of a court of equity it would seem immaterial whether the question were directly or collaterally involved. See *Hamilton* v. *Carroll, supra.* However, the objection of adequate legal remedy would vanish when irreparable injury to property is threatened, as in the principal case, nor would the plaintiff's position be assailable as invoking equity's protection for a mere political right. See *Pickett* v. *Russell* (1900) 42 Fla. 116; *Green* v. *Mills* (1895) 69 Fed. 852; *Boren* v. *Smith* (1868) 47 Ill. 482. Upon these last grounds the principal case is supportable.

ESTOPPEL—JUDGMENT IN REM—ESTOPPEL AGAINST ESTOPPEL.—Plaintiff, a patentee, proceeded against the defendant for infringement, and secured an injunction and an order directing the assessment of damages. Pending the hearing, the defendant petitioned for and secured the revocation of the patent. *Held,* the revocation did not affect the question of damages, *Poulton* v. *Adjustable Cover Co.* (1909) 99 L. T. 647.

The defendants are estopped by the judgment granting the injunction to deny the validity of the patent because as to them the matter is *res adjudicata. Shoe Machinery Co.* v. *Cutlan* (1896) 74 L. T. n. s. 166; *Priestman* v. *Thomas* (1884) 51 L. T. n. s. 843. *Res adjudicata* does not affect the revocation proceedings, since the petition for revocation, under the British Patent Act of 1883, is presented in behalf of the public. *In re Deeley's Patent* (1895) 72 L. T. 702. The revocation determines the status of the patent and so is *in rem.* 9 COLUMBIA LAW REVIEW 82; 111 Robinson, Patents 974. This the main case rightly concedes. *Mill Co.* v. *Purifier Co.* (1889) 40 Fed. 305, sometimes cited *contra,* is distinguishable as an action *inter partes* and not in behalf of the public. The judgment revoking the patent because of prior user shows it never was legally issued and so is void *ab initio,* Robinson, Patents, *supra;* and being *in rem* estops "all the world" from asserting the validity of the patent. *Woodruff* v. *Taylor* (1847) 20 Vt. 65, 73. The result is plaintiffs and defendants are each bound by opposing estoppels, which set the matter at large, Coke, Lit. 352b (6), i. e., open it to evidence for both parties. This precise point apparently has not been decided in England, though in the United States *Kimball* v. *Schoff* (1860) 40 N. H. 190, 196, and *Shaw* v. *Broadbent* (1891) 129 N. Y. 114, 125, sustain Lord Coke's dictum. The reasoning of the court, in the main case, refusing to admit the revocation of the patent as evidence in the assessment of damages appears untenable.

EXECUTORS AND ADMINISTRATORS—STATUTES OF FRAUDS AND OF LIMITATIONS.—An executrix, to remove the bar of the Statute of Limitations, made a nominal payment on a debt outlawed in the lifetime of the testator. *Semble,* an executor or administrator is not bound to plead the Statute of Limitations, but a failure to plead the Statute of Frauds amounts to a *devastavit. Haskell* v. *Manson* (Mass. 1909) 86 N. E. 937.

Generally an executor or administrator is guilty of a *devastavit* for payment of claims he is not bound to satisfy. 3 Williams, Executors (7th Am. Ed.) 327. The English courts and many American courts have allowed an exception where a claim is barred by the Statute of Limitations, on the

theory that the decedent was morally bound to pay the claim and it would be unconscientious to compel the personal representative to plead the Statute. *Hill* v. *Walker* (1858) 4 K. & J. 166; *Stahlschmidt* v. *Lett* (1853) 1 Sm. & G. 415, 419; *Distributees v. Godbolt's Admrs.* (1845) 7 Ala. 304. In other states the rule is *contra*. *Butler* v. *Johnson* (1888) 111 N. Y. 204. 212. The reasoning of the English cases would apply equally well to the Statute of Frauds, but the courts have refused to extend the rule, admittedly anomalous, to this latter case. *In re Rownson* (1883) 29 Ch. Div. 358. Nor is it allowed where the claim has been judicially declared barred by the Statute of Limitations. *Midgley* v. *Midgley* L. R. (1893) 3 Ch. 282. Some courts have suggested a distinction between claims barred in the testator's lifetime and those barred afterwards, requiring the Statute to be pleaded as to the former, *Rogers* v. *Wilson* (1853) 13 Ark. 507, 512, but in *Hill* v. *Walker* and *Stahlscmidt* v. *Lett, supra*, the debts were barred before the testator's death. It hardly seems unconscientious for an executor to refuse to pay a debt his testator was not bound to pay, so this suggested restriction appears reasonable.

FEDERAL PRACTICE—GENERAL DENIAL—BURDEN OF JURISDICTIONAL PROOF.—The defendant in the Circuit court, sitting in Missouri, pleaded a general denial to a complaint containing proper jurisdictional averments. Under the Code of Missouri, a general denial puts in issue all material allegations of the complaint. *Held*, Sanborn, J., concurring in result, Hook, J., dissenting, diversity of citizenship was not put in issue and defendant must sustain the burden of proof. *Hill* v. *Walker* (1909) U. S. C. C. A. (8th Cir.) Case No. 2766.

By the Conformity Act of 1872, (R. S. § 914) Federal procedure in actions at law must approximate that of the state where the action is tried. Consequently where a state code provides that a general denial shall put in issue all material allegations in the complaint, the jurisdictional allegation of diversity of citizenship is put in issue and must be proved by the plaintiff. *Roberts* v. *Lewis* (1892) 144 U. S. 653; *Wells Co.* v. *Gastonia Co.* (1905) 198 U. S. 177; see *contra, Nat. Assn.* v. *Sparks* (1897) 83 Fed. 225; *Imp. Co.* v. *Wyman* (1889) 38 Fed. 574. Two cases, apparently *contra, Steigleder* v. *McQuesten* (1905) 198 U. S. 141; and *Hunt* v. *Exchange* (1907) 205 U. S. 322, are to be distinguished; the first on the form of its pleadings, and the later as an equity action which is expressly excluded from the operation of the Conformity Act. Cases arising in common law procedure states are also to be distinguished, *Adams* v. *Shirk* (1902) 117 Fed. 801, since at common law jurisdictional averments could only be overcome by affirmative proof under a plea in abatement. *Sheppard* v. *Graves* (1852) 14 How. 55. Section 5 of the Act of 1875 providing that a suit shall be dismissed at any time when it shall appear to the satisfaction of the court that the case is not properly within its jurisdiction, would not appear to affect the method of procedure where a general denial is pleaded under code practice. *Roberts* v. *Lewis, supra*. Although the decision might be sustained on the points concurred in by Sanborn, J., the special argument of the majority opinion, per Amidon, J., seems open to criticism.

FEDERAL PRACTICE—REMOVAL OF CAUSES—JURISDICTION.—The plaintiff brought a joint tort action against a foreign railroad corporation and two resident inspectors, for injuries occasioned by defective appliances. The corporation, alleging fraudulent joinder of the resident defendants, petitioned to have the cause removed to the Federal court. *Held*, the cause was removable. *Ward* v. *Pullman Car Corp.* (Ky. 1908) 114 S. W. 754.

A state court is not bound to surrender its jurisdiction on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer. *Stone* v. *So. Car.* (1885) 117 U. S. 430. This right is established if the issue raised is one of fact, and the jurisdiction of the federal courts is then exclusive. *Kansas City R. R. Co.* v. *Daugherty* (1890) 138 U. S. 298; *Bank* v. *Fritzlen* (1907) 75 Kan. 429. The finality of a state court's finding of fact necessitates this to protect

federal jurisdiction. *State* v. *Barnes* (1895) 5 N. D. 350. If, however, the issue is one of law, the question of removability is for the state court. *Ala. So. Ry.* v. *Thompson* (1906) 200 U. S. 206. Where the state court has decided against the removal, the petitioner may appeal in the state courts, or resort to the Federal court, which, though it may independently decide the question of removability, will ordinarily, upon grounds of comity, decline to do so. *Springer* v. *Howes* (1895) 69 Fed. 849. In case both courts claim jurisdiction, on an ultimate appeal to the Federal Supreme Court, the law of the state would be a potent factor, although not a decisive one. *Burgess* v. *Seligman* (1882) 107 U. S. 20. A removal from a state court having been ordered, the cases are in conflict as to the plaintiff's right of appeal to a higher state court. *Bell* v. *Dix* (1872) 49 N. Y. 232; *Stone* v. *Sargent* (1880) 129 Mass. 503. The decision of the principal case, which involved only a question of law, is sound.

FUTURE INTERESTS—CONTINGENT REMAINDERS—DESTRUCTION BY MERGER.—A life-tenant who was also at the time of the death of the testatrix her sole heir, by deed expressly conveyed both life estate and reversion. *Held*, that the two estates merged so as to destroy a contingent remainder, limited by the will. *Bond* v. *Moore* (Ill. 1909) 86 N. E. 386.

The common law rule that every remainder requires a particular estate to support it, *Madison* v. *Larmon* (1897) 170 Ill. 65, makes the destruction of a contingent remainder by the holder of the preceding estate a simple matter, where the device of interposing trustees to support contingent remainders has not been employed. The life-tenant could by a tortious feoffment forfeit his life estate, *Redfern* v. *Middleton* (S. C. 1839) 1 Rice's L. 459, or, if he also held the next vested estate either in remainder or reversion, with the aid of doctrine of merger by a conveyance effect the union of the two, *Egerton* v. *Massey* (1857) 3 C. B. n. s. 338, defeating the contingent remainders so that he would have a free title upon a reconveyance. Merger would not result where the two interests were created by the same instrument, as that would defeat the intention of the creator, *Bennett* v. *Morris* (Pa. 1835) 5 Rawle 8; *Craig* v. *Warner* (D. C. 1887) 5 Mackey 460, a reason which, however, would seem as applicable after the conveyance as before. The principal case illustrates the persistence of common law principles in Illinois. Many states have adopted legislation which prevents the defeating of expectant estates by the termination of the precedent estate before the happening of the contingency. Stimson, Am. Stat. L. §§ 1402, 3; Reeves, Real Property, § 607 (a). In Illinois apparently a tortious feoffment would have been equally possible and effectual, as the life-tenant was himself the reversioner entitled to entry upon forfeiture.

INFANCY—DISAFFIRMANCE OF CONTRACTS—STATUTE OF LIMITATIONS.—The plaintiff asks judgment annulling a deed made by him during infancy. *Held*, two judges dissenting, the action is maintainable if disaffirmance has been made within ten years after attaining majority. § 388 N. Y. Code Civ. Proc. applying. *O'Donohue* v. *Smith* (1909) 114 N. Y. Supp. 536.

Where a plaintiff must do some act to establish a cause of action at law, the courts are not united as to the extent of time within which he must act, *Campbell* v. *Whoriskey* (1898) 170 Mass. 63, although generally a reasonable time may not be exceeded, Clark, Contracts 244, and the period provided by the Statute of Limitations for the bringing of the action is sometimes adopted as a test of reasonableness. *Sims* v. *Everhardt* (1880) 102 U. S. 300; *Wells* v. *Seixas* (1885) 24 Fed. 82. In equity the question is one of *laches*, Wood, Limitations, §§ 59, 118, but the Statute of Limitations applicable to an analogous cause of action is also used as a guide. *Codman* v. *Rogers* (1830) 10 Pick. 112. In order that an infant may bring an action under a deed made during minority, he must disaffirm it after becoming of age. *Voorhies* v. *Voorhies* (1857) 24 Barb. 150; *Green* v. *Green* (1877) 69 N. Y. 553. He cannot do so while an infant, since such an act would not be conclusive. *Zouch* v. *Parsons* (1765) 3 Burr 1794; *Hastings* v. *Dollar-*

*hide* (1864) 24 Cal. 195; *McCormic* v. *Leggett* (1862) 8 Jones 425. As a consequence, the dissenting opinion in the principal case, declaring that the time should be computed from the making of the deed, appears unsound.

INSANE PERSONS—COMMITTEE'S TORT LIABILITY—DEFECTIVE PREMISES.—A tenant of a part of premises belonging to a lunatic, but under the control of his committee, sued the committee in its personal capacity for injuries occasioned by the defective condition of a common hall-way. *Held,* defendant is personally liable for the consequences of his own negligence. *Rooney* v. *Peoples' Trust Co.* (1908) 114 N. Y. Supp. 612. See NOTES, p. 353.

INTERSTATE COMMERCE — DISCRIMINATION IN SIDING FACILITIES — STATE POWER OVER INTERSTATE COMMERCE.—A state court compelled by *mandamus* an interstate carrier to supply cars to a shipper upon his private siding and to transfer them to a connecting carrier. The carrier furnished such facilities to other shippers and the order was issued to prevent unjust discrimination. *Held,* two justices dissenting, the judgment was not an unconstitutional regulation of interstate commerce and the Interstate Commerce Act did not deprive the state court of jurisdiction. *Mo. Pac. Ry. Co.* v. *Larrabee Flour Mills Co.* (1909) 29 Sup. Ct. Rep. 214. See NOTES, p. 348.

MALICIOUS PROSECUTION—INSTITUTION OF FORMER ACTION.—On a criminal charge made by the defendant, a warrant was issued but not served on the plaintiff. *Held,* three judges dissenting, this constituted a judicial proceeding on which to base an action of malicious prosecution. *Halberstadt* v. *N. Y. Life Ins. Co.* (N. Y. 1909) 86 N. E. 801.

Where a person in good faith makes a criminal complaint, the occasion is privileged; the affidavit, for the purpose of giving immunity from an action of slander, being deemed part of a judicial proceeding. *Bunton* v. *Worley* (Ky. 1815) 4 Bibb. 38. But, malicious prosecution does not lie because of the good faith. *Cooper* v. *Armour* (1890) 42 Fed. 215. Where, on the other hand, the affidavit is malicious and without probable cause, since the complainant virtually creates the occasion, the proceeding loses its judicial character, with the result that slander lies, *Hill* v. *Miles* (1837) 9 N. H. 9, whereas malicious prosecution does not. *Newfield* v. *Copperman* (N. Y. 1873) 15 Abb. Pr. (n. s.) 360; *Coffey* v. *Myers* (1882) 84 Ind. 105, *contra.* When a warrant issues, however, the judicial proceeding is generally regarded as having begun and the other elements being present, malicious prosecution lies. *Holmes* v. *Johnson* (1852) 44 N. C. 44. A recovery in such an action, including as it does damages for the injury to reputation, *Shelden* v. *Carpenter* (1851) 4 N. Y. 579, is a bar to an action for slander. *Jarnigan* v. *Fleming* (1870) 43 Miss. 710. That where an arrest has taken place, a person often has the option of suing for false imprisonment or malicious prosecution seems to have induced some courts into holding that an arrest is necessary for the latter action; *Lawyer* v. *Loomis* (N. Y. 1874) 3 Thomp. & C. 293; but this seems unsound except where the arrest is the only damage that can be shown. Townsend, Slander & Libel 422. The principal case, therefore, appears sound.

MUNICIPAL CORPORATIONS—ESTOPPEL BY RECITALS IN BONDS.—The defense to a suit on county court bonds, was that they were issued in excess of the amount authorized by the court order. *Held,* the county was estopped against a *bona fide* holder by recitals that the bonds were issued in compliance with the empowering statute. *County of Presidio* v. *Noel Young Bond & S. Co.* (1909) 29 Sup. Ct. Rep. 237.

It is the present doctrine of the Supreme Court that if the power to issue exists, and the statute empowers the officers of the municipal corporation to decide whether the preliminary conditions have been complied with, owing to the necessity of giving financial stability to municipal obligations, the corporation will be estopped against a *bona fide* holder to deny the truth of their recitals of compliance. *Knox County* v. *Aspinwall* (1858) 21

How. 539; *St. Joseph Tp.* v. *Rogers* (1872) 16 Wall. 644, 659; *Stanley County* v. *Coler* (1903) 190 U. S. 437. The Supreme Court has even denied the defense of want of power, *Chaffee County* v. *Potter* (1892) 142 U. S. 355 (bonds issued in excess of a constitutional limitation), but when the enabling statute stipulated that the precedent conditions be made a matter of public record, the holder can not rely on the recitals. *Sutliff* v. *Lake County* (1892) 147 U. S. 230. Since the power to issue exists, the decision in the principal case is in conformity with the previous holdings of the court, especially in view of its present tendency to diminish the duty of the holder to go behind the recitals. *Evansville* v. *Dennett* (1895) 161 U. S. 434; *Stanley County* v. *Coler, supra.* Compare the earlier case of *McClure* v. *Tp. of Oxford* (1876) 94 U. S. 429, 432. State courts, however, have been less ready to hold corporations estopped by the recitals. *Treadwell* v. *Commissioners* (1860) 11 Oh. St. 183. While admitting that irregularity in the issuing will not invalidate the bonds, some state courts uphold the view that failure to comply with the preliminary conditions causes a failure of power to issue, which is not cured by the recitals. *Carpenter* v. *Lathrop* (1873) 51 Mo. 483; *Gould* v. *Stirling* (1861) 23 N. Y. 439, 456.

NEGOTIABLE INSTRUMENTS—HOLDER IN DUE COURSE—DELIVERY.—The holder in due course brought action against the drawer on a check which had been fraudulently put in circulation by the defendant's clerk. *Held,* under Neg. Instr. Law § 35 (33) a valid delivery is conclusively presumed in favor of the plaintiff. *Buzzell* v. *Tobin* (Mass. 1909) 86 N. E. 923.

Before the statute a negotiable instrument was not complete until delivered; and was considered a contract of the time and place of delivery. *Wells Fargo & Co.* v. *Van Sickle* (1894) 64 Fed. 944; *Hilton* v. *Houghton* (1853) 35 Me. 143. Lack of delivery was a good defense, even to an action by a holder in due course. *Burson* v. *Huntington* (1870) 21 Mich. 415, 430; *Baxendale* v. *Bennett* (1878) 3 Q. B. Div. 525, 529; *contra, Shipley* v. *Carroll* (1867) 45 Ill. 285, 287. The Neg. Instr. Law § 35 (33), declares every contract on a negotiable instrument incomplete until delivery of the instrument. The same section declares that a valid delivery by all prior parties is conclusively presumed in favor of the holder in due course. The meaning of the section is rendered doubtful by the use of words of rebuttable presumption in the following sentence. In *Mass. Nat'l Bank* v. *Snow* (1905) 187 Mass. 159, upon which the court relied, recovery was allowed on a note which had been delivered by the maker, but the court intimated that a contrary result would be proper where such delivery was not shown. The principal case, however, interprets the section as it was intended by the framers of the statute, Crawford, Neg. Instr. Law § 35 (33) note (c), and is in accord with other decisions. *Greeser* v. *Sugarman* (1902) 76 N. Y. Supp. 922.

OFFICERS—REMOVAL—REAPPOINTMENT DURING TERM.—The Governor removed the defendant from office for cause. The Board of Aldermen, exercising their power to fill vacancies, immediately reappointed him. *Held,* one judge dissenting, that such reappointment was illegal and void, the removal operating as a disqualification for the remainder of the term. *People* v. *Ahearn* (App. Div. 1909) 40 N. Y. L. J. 2477.

A public officer has the right to hold an office and to perform its duties for the term prescribed by law; *Matter of Hathaway* (1877) 71 N. Y. 238; but each term of an office is an entity separate and distinct from all other terms of the same office. *Thurston* v. *Clark* (1895) 107 Cal. 285. Proceedings for removal involve eligibility to continue in office, and an order of removal disqualifies for the remainder of the term. *State* v. *Dart* (1894) 57 Minn. 261. So that where an officer has been removed by the courts for cause, and it is decreed that he shall be excluded for the rest of the term, a re-election by the electors will be no defense to an action for contempt for disobeying the decree, *State* v. *Rose* (1906) 74 Kan. 362, though it has been held *contra,* that a removal does not prevent reinstatement by election.

*State* v. *Common Council of Jersey City* (N. J. 1856) 1 Dutch. 537. The propriety of a removal by the Governor for cause cannot be questioned by the courts, providing that the forms of law are followed. *Matter of Guden* (1902) 171 N. Y. 529. The vesting of such large discretionary powers in the Governor is inconsistent with the idea that his action might be immediately negatived by the appointing power.

PARTITION—RIGHT TO SUE—TRUSTEE IN BANKRUPTCY.—A trustee in bankruptcy brought a bill in equity for the partition of lands. *Held,* for the defendant, as the trustee is not empowered to institute such proceedings. *Hobbs* v. *Frazier* (Fla. 1908) 47 So. 929.

The right to partition is at present absolute in a co-tenant having a legal and beneficial interest in the land, and this right is granted to trustees of property owned in common, whose duties require the exercise of a wide discretion. *Gallie* v. *Eagle* (N. Y. 1873) 65 Barb. 583; *Noecker* v. *Noecker* (1903) 66 Kan. 347. But the courts have refused this right to a trustee vested with a bare power of sale. *Brassy* v. *Chalmers* (1852) 16 Beavan 223. As the trustee in bankruptcy may be likened to such a trustee in that his primary office is to sell the assets of the bankrupt for the benefit of creditors, he has no inherent power to sue for partition, nor is the right given him by statute. However, the court may, in its discretion, determine what course the interests of the creditors demand, e. g., the continuation of the bankrupt's business for a time, *Assignment of St. James Hotel Co.* (1896) 3 Oh. N. P. 42, or the completion of unfinished chattels, *Foster* v. *Ames* (1869) 9 Fed. Cases 4965, and order the trustee to act accordingly. In the exercise of this discretion the court may well authorize partition proceedings. *Jewett* v. *Perette* (1890) 127 Ind. 97. However, no such order having issued in the principal case, the result reached is correct.

PARTNERSHIP—CORPORATION AS PARTNER—ACCOUNTING.—The plaintiff corporation, having entered into a partnership with an individual sought, on the dissolution of the partnership to have an accounting. *Held,* the plaintiff was entitled to the relief sought. *Doubleday, Page & Co.* v. *Shumaker* (1908) 113 N. Y. Supp. 83.

By the weight of authority, a partnership agreement of a corporation is regarded as *ultra vires,* since the corporation thereby vests partial control of its affairs in another, and such a power cannot be implied from its charter. *Whittington Mills* v. *Upton* (Mass. 1858) 10 Gray 582; *Mallory* v. *Hanaur Oil Works* (1888) 86 Tenn. 598. Where benefits have been conferred under an *ultra vires* contract, two views are entertained in regard to a recovery therefor. 5 COLUMBIA LAW REVIEW, 399. In New York and a few other jurisdictions suit may be brought on the original contract and the other party is precluded from setting up the defense of *ultra vires. Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24. If this view be adopted, the existence of the partnership relation cannot be denied by the defendant, and there can be no doubt of the plaintiff's right to an accounting. *Boyd* v. *Carbon Block Co.* (1897) 182 Pa. St. 206; *Standard Oil Co.* v. *Scofield* (N. Y. 1885) 16 Abb. N. C. 372. By the other view the contract is regarded as void, and recovery is allowed in quasi contract. *Morville v. American Tract Soc.* (1877) 123 Mass. 129. Under this view the partnership relation would never have come into being, but the parties would have become co-owners of the partnership assets, *Hackett* v. *Multnomah Ry. Co.* (1885) 12 Ore. 124, and the relation of tenants in common is one which admits of an accounting between the parties. *Hackett* v. *Multnomah Ry. Co., supra; Leach* v. *Beatties* (1860) 33 Vt. 195. The case may, therefore, be supported.

PLEADING AND PRACTICE—ANSWER BY MAIL—TIME WITHIN WHICH TO AMEND.—After the plaintiff had served an amended complaint, defendant served by mail his original answer, to which the plaintiff could only demur and not reply. Thirty-eight days thereafter the defendant served an amended answer. *Held,* the defendant had forty days within which to

amend. *Schlegel* v. *Catholic Church* (Ct. of App. 1909) 40 N. Y. L. J. No. 128.

Where service by the defendant is by mail, § 798, N. Y. Code Civ. Proc. allows the plaintiff as "adverse party" double time in which to act. In determining whether the defendant has double time in which to amend, two questions arise. First, whether the defendant, also as an "adverse party," obtains this right under § 798; and, second, whether he secures it under § 542, giving him the right to amend at any time before the period for "answering" the pleading expires. The defendant is not an "adverse party" under § 798, and therefore it has been held that he could not by his own act double his time to amend. *Armstrong* v. *Phillips* (1891) 60 Hun, 243. Such a holding that the defendant may not double his time under § 798 directly, is not conclusive, however, because under § 798 he doubles the plaintiff's time "to act," and thereby by § 542 would acquire an equal time himself, if the term "answering" in the later section includes the plaintiff's "act" viz.: replying or demurring. In *Schlesinger* v. *Nat. Bank* (1906) 112 App. Div. 121, it did not appear that the plaintiff might not have replied, so that this decision may be regarded at least as including replying in the term "answering." In construing analogous sections of the old Code, an early case refused the defendant double time, since the plaintiff could only demur, and "answer" was not regarded as including demurrer. *Toomey* v. *Andrews* (1872) 48 How. Pr. 332. This authority, however, may be distinguished because of the peculiar wording of the statute there construed, as contrasted with the context of the present section which necessarily points toward a liberal significance of the word "answering." *Schlesinger* v. *Nat. Bank, supra.* The principal case, therefore, appears sound.

PLEADING AND PRACTICE—COSTS—SECOND SUIT—STAY OF PROCEEDINGS.—In an action at law for deceit the defendant moved to stay proceedings until satisfaction of a judgment against the plaintiff for costs in a former equitable action between the same parties to set aside a conveyance of the land in question. *Held,* the motion should be denied. *Maas* v. *Rosenthal* 40 N. Y. Law Jour. No. 120.

The court has, as part of its necessary control over its own proceedings, see *Gerety* v. *R. R. Co.* (Pa. 1873) 9 Phila. 153, or as an equitable prerogative to prevent the multiplication of suits, see *McIntosh* v. *Hoben* (1860) 11 Wis. 400, discretionary power to stay, on motion, proceedings in a second action, until payment of costs of a former action between the same parties for the same subject matter. Complete identity of the causes is not necessary, *Morgenstern* v. *Zink* (1894) 6 Misc. 418; *Morse* v. *Maybury* (1859) 49 Me. 151; but see *Arnold* v. *Clark* (N. Y. 1880) 9 Daly 259, 262, and there is no fixed rule as to when the subject matter is the same. The stay is granted on the presumption that the second suit is vexatious, *Harless* v. *Petty* (1884) 98 Ind. 53, and will be withheld if the contrary is proved. *Lawrence* v. *Dickinson* (N. Y. 1824) 2 Cowen 580; *Sellers* v. *Meyers* (1893) 7 Ind. App. 148, 152, 153. The stay, at first refused when one action was at law and the other at equity, *Wild* v. *Hobson* (1813) 2 Ves. and B. 105, was later extended to this class of cases whenever vexatiousness was established as a matter of fact, the difference in forum preventing the ordinary presumption from arising. *Kerr* v. *Davis* (N. Y. 1838) 7 Paige 53. But a tendency in the New York inferior courts since the consolidation of Law and Equity, to grant a stay in this class of cases even in the absence of affirmative proof of vexatiousness, *Spaulding* v. *Board Co.* (N. Y. 1901) 58 App. Div. 316; see also *Sprague* v. *Bartholdi Hotel Co.* (N. Y. 1898) 68 Hun, 555, cannot, it is submitted, be regarded as settled law. The principal case is therefore sustainable on the ground that vexatiousness was not affirmatively proved.

PLEADING AND PRACTICE—COURTS OF LIMITED JURISDICTION—COUNTERCLAIM.—In a prior suit between the same parties, the present plaintiff failed to plead a counterclaim, the amount of which was beyond the jurisdictional limit of the Court and to the present demand for that sum the defendant

pleaded *res adjudicata*. *Held*, the plea was demurrible as the lower court was without jurisdiction to hear such a counterclaim. *Dixon* v. *Watson* (Tex. 1909) 115 S. W. 100.

The rule that a court whose jurisdiction is limited to a certain amount cannot entertain a suit beyond that sum is also applied when the defendant files a counterclaim, since a counterclaim is a statutory cross-complaint in which the defendant must show facts justifying affirmative relief in an independent suit, *Vassar* v. *Livingston* (1855) 13 N. Y. 248. In some states the jurisdictional inhibition is expressly extended to counterclaims by statute, *Holden* v. *Wiggins* (Pa. 1832) 3 P. & W. 469, while in others it is made to embrace them by implication, *Griswold* v. *Pieratt* (1895) 110 Cal. 259; *Picquet* v. *Cormick* (Ga. 1831) Dudley 20. New York has refused to extend the restriction to a defendant, basing its decision largely on § 348, Code Civ. Proc. This rule removes the legislative restrictions on lower courts and allows them to adjudicate claims to any amount, if advanced by defendants. *Howard Iron Works* v. *Buffalo Electric Co.* (1903) 176 N. Y. 1; reversing 81 App. Div. 386. When the defendant has a counterclaim without the jurisdiction of the Court he can refuse to plead any part of it and pursue his remedy in a higher court. *Simpson* v. *Lapsley* (1846) 3 Pa. 459. If a statute requires that an available counterclaim be pleaded by the defendant he cannot maintain a subsequent action for that sum, *Henry* v. *Milham* (1832) 13 N. J. L. 266, but where the statute, as in Texas, is merely permissive, *Norton* v. *Wochler* (1903) 31 Tex. Civ. Appeals 522, the defendant is not precluded, and it is submitted that the reasoning of the court in the principal case concerning *res adjudicata* is accordingly irrelevant.

Police Power—Freedom of Contract—Regulation of Industry.—An Arkansas statute prohibited coal miners from contracting to be paid on the basis of the weight of the coal mined after it had been filtered or "screened." *Held*, a valid exercise of the police power. *McLean* v. *Arkansas* (1909) 29 Sup. Ct. Rep. 206.

Statutes reasonably necessary to prevent fraud in dealings between two parties not on an equal footing are a valid exercise of the police power. Freund, Police Power §§ 274, 275; *Pittsburg etc. Coal Co.* v. *Louisiana* (1894) 156 U. S. 590; *Eaton* v. *Kegan* (1874) 114 Mass. 433. And the fact that in nearly all cases the party whom the statute aims to protect has been the buyer of commodities, whereas in the principal case he is the seller of labor is unimportant. See *State* v. *Wilson* (1898) 7 Kan. App. 428. For in a leading case it has been judicially recognized that employer and employe do not deal on an equality, *Holden* v. *Hardy* (1897) 169 U. S. 366; and statutes aimed to prevent even a non-fraudulent curtailment of wages have been sustained. See *Iron Co.* v. *Harbison* (1901) 183 U. S. 13; *Opinion of the Justices* (1895) 163 Mass. 589; but see *Jordan* v. *State* (Tex. Crim. App. 1907) 103 S. W. 633. Although the decision in the principal case is therefore no departure from precedent, the *dicta* refusing to question the correctness of the legislature's belief in the necessity of the law in order to prevent fraud, or to discuss State cases which declared that similar statutes were unconstitutional as unprecedented infringements of the right of employer and employe to fix the mode by which wages shall be computed, see *Ramsey* v. *People* (1892) 142 Ill. 380; *in re House Bill* 203 (1893) 21 Colo. 27; but see *State* v. *Peel Splint Coal Co.* (1892) 36 W. Va. 802, show an increasing reluctance to substitute, except in extreme cases, the court's opinion of the reasonableness of legislation for that of the legislature.

Public Service Companies—Rate Making by Commission—Nature of Function.—Appeal from order denying motion to quash a writ of *certiorari* to review an order of the Public Service Commission fixing a rate for certain railways. *Held*, the action of the Commission under § 49 of the Public Service Commissions Law is judicial in character and accordingly properly reviewable by *certiorari*. *People ex rel. Joline et al.* v. *Willcox et al.* (N. Y. 1909) N. Y. L. J. No. 127. See Notes, p. 341.

RULE AGAINST PERPETUITIES—REMOTENESS AS A TEST OF PERPETUITY IN NEW YORK.—By will, a testator bequeathed personal property to executors in trust to pay the income to his daughter F during her life. Upon her death he gave one equal undivided share to each of her issue as he or she should attain the age of twenty-one. If his daughter F should die leaving no issue who should attain the age of twenty-one, he gave the *corpus* of the trust fund to his daughter M and his son absolutely. The validity of the gifts over was contested. *Held*, any issue of F would take a vested estate subject to be divested if the gifts over were valid, but that the gifts over were void as they depended upon a contingency which might not occur, if ever, within two lives in being and suspended the absolute ownership of personal property beyond the statutory period. *Matter of Wilcox*, (Ct. of App. 1909) 40 N. Y. Law Jour. No. 124. See NOTES, p. 338.

WILLS—CONSTRUCTION—CLASS GIFTS.—A testator provided that after his wife's death his estate should be divided between the children of his brother and those of his ward. He later revoked the provision in favor of the ward's children. His heirs claim this portion. *Held*, that the entire residuum should be divided among the brother's children. *Saunders* v. *Saunders' Admrs.* (Va. 1909) 63 S. E. 410.

When there is a gift to a class, the survivors take all, *Swallow* v. *Swallow* (1896) 166 Mass. 241, even though they are made tenants in common. *Aspinall* v. *Duckworth* (1886) 35 Beav. 307. All who come into *esse* prior thereto augment, all who die contract, the class. *Leigh* v. *Leigh* (1854) 17 Beav. 605. The vice of remoteness under the rule against perpetuities affects a class as a whole. *Pearks* v. *Mosely* (1880) L. R. 5 A. C. 719. The distinguishing features of such gifts are that an aggregate amount is given to a body of persons, that the number of beneficiaries is to be determined at a future time, and that the share of each depends upon the number who may form the class. *Matter of Russell* (1901) 168 N. Y. 169; 1 Jarman on Wills (5th Am. Ed.) 269. The naming of some or all of the individuals does not affect the character of the gift, where it appears that the testator contemplates that the size of the shares is to be determined by the number of the class. *In re Stanhope's Trusts* (1859) 27 Beav. 201; *Kingsbury* v. *Walter* (1899) L. R. 2 Ch. 314. The English decisions seem inextricably confused on this point, despite a recent attempt to reconcile them. Cf. *Kingsbury* v. *Walters* (1901) L. R. A. C. 187; 9 Jur. n. s. Pt. 2, 301. Some of the later cases point to the further requirement that all the beneficiaries, to constitute a class, must be in some common relation to the testator. *In re Chaplin's Trusts* (1864) 33 L. J. Ch. 183; *In re Jackson* (1883) L. R. 25 Ch. Div. 162; *Kingsbury* v. *Walter*, *supra*, per Davey, L. J. The American cases, however, have not suggested this distinction and in their light the principal case may be supported, as the revocation merely contracted an existing class.